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Supreme Court, U.S.
FILED

NO. 00-830 JUN 7 - 2000

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES WIRTH
Petitioner,

vs.

COLLEGE OF THE OZARKS, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a college which self-confesses to be a non-denominational institution is exempted from complying with Title VII.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

1. College of the Ozarks

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OPINIONS BELOW

The March 9, 2000 judgment of the United States Court of Appeals for the Eighth Circuit is reprinted in the separate appendix to this petition, pp. App. 1.

The prior order of the United States District Court for the Western District of Missouri Southern Division entered May 18, 1999 awarding attorney's fees and costs is reprinted in the separate appendix to this petition, pp. App. 27.

The prior order of the United States District Court for the Western District of Missouri Souther Division entered March 23, 1999 granting defendant's Motion for Summary Judgment is reprinted in the separate appendix to this petition, pp. App. 12

The prior order of the United States District Court for the Western District of Missouri Souther Division entered August 28, 1998 granting defendant's Motion to Dismiss is reprinted in the separate appendix to this petition, pp. App. 3

STATEMENT OF JURISDICTION

The Judgment of the Eighth circuit Court of Appeals was entered on March 9, 2000.
The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

STATEMENT OF THE CASE

James Wirth began working for the College of the Ozarks in 1978 as an associate professor in the sociology department. He was granted tenure on February 1, 1984. The College of the Ozarks was originally founded by the Presbyterian Church. Today, the college does not prefer or encourage any particular denomination of Christianity, but practices a strong belief in Christianity.

Dr. James Wirth is a member of and subscribes to, the views of the Catholic Church. In 1989, Dr. Wirth was asked to do a survey on the attitudes of the faculty at the College of the Ozarks. The survey was critical of the administration and since

the survey was done, Dr. Wirth had difficulties receiving an average pay raise, or any pay raise, each year. Additionally, Dr. Wirth believed that the administration treated him differently than non-Catholic professors.

In the fall of 1996, Dr. Wirth showed a video in his Human Sexuality class that a couple of students found offensive. The students never spoke with Dr. Wirth, but rather voiced their complaint to the administration. Dr. Kenton Olson, the Dean of Faculty, requested an immediate response from Dr. Wirth concerning the allegations. Dr. Wirth put together a representative sample of the videos being shown in the class and delivered them to Dr. Olson. Dr. Olson responded by sending a letter to Dr. Wirth, threatening suspension if a complete response to the allegations were not made. Dr. Wirth requested an extension of time of thirty (30) days so that all materials could be accumulated and a complete response made, after finals for the semester. Dr. Olson acquiesced to the request but sent a letter indicating that he was suspending Dr. Wirth with pay and would recommend dismissal for cause.

When Dr. Wirth asked what being suspended meant, Dr. Olson told him, "Fired." Pursuant to the faculty handbook, Dr. Wirth then requested President Jerry Davis, to review the Dean's decision. When the President upheld the Dean's decision, Dr. Wirth appealed to the Faculty Welfare Committee.

Dr. Wirth's appeal to the Faculty Welfare Committee, was handled pursuant to the 1996 handbook. Dr. Wirth complained of numerous procedural due process rights that had been deleted from the 1984 handbook regarding grievance

hearings. Included in Dr. Wirth's complaints were that the 1996 handbook did not allow Dr. Wirth to cross examine any of the witnesses against himself, did not allow the presence of his attorney, and did not allow a stenographic or other record of the proceeding, and finally, the 1996 handbook did not allow for a secret vote. Despite these objections raised by Dr. Wirth, he agreed to go through the process. The Faculty Welfare Committee upheld the decision of the Dean and the President, and this decision was accepted once again by the President and forwarded on to the Board of Trustees. The Board of Trustees allowed Dr. Wirth to speak to the Board, and then they upheld the decision as well and discharged Dr. Wirth, effective May 31, 1996.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals conflicts with Congress's intentions regarding exemptions to Title VII

The Court of Appeals affirming the District Court's judgment concerning the College of the Ozarks may be exempted from complying with Title VII cannot be squared with Congress's intent when Congress determined that religious organizations should be exempted from complying Title VII.

The best rationale for the religious exemption in Title VII, can be found in *Little v. Wurel*, 929 F2d 944 (3rd Cir. 1991). In *Little*, the plaintiff was a Protestant teacher who had

taught at a Roman Catholic School which was run by St. Mary Magdalene Parish. By all accounts Professor Little was a very good teacher who was allowed to teach at the school even though the school new that she was a Protestant. Little took a sabbatical in order to get re-married. When she returned, her contract was not renewed. The St. Mary Magdalene Parish determined that her marriage could not be recognized by the Catholic Church because she had not had her previous marriage annulled and therefore, they relied on a clause in the employment contract between Little and the parish which contained the so-called "Cardinals clause" which read, "Teacher recognizes the religious nature of the Catholic school and agrees that employer has the right to dismiss a teacher for serious public immorality, public scandal or public rejection of the official teachings, doctrines or laws of the Roman Catholic Church, thereby terminating any and all rights that the teacher may have hereunder, subject however to the personal due process rights promulgated by the Roman Catholic Church." (at p. 946)

The court then followed the just cause termination clause in the contract which indicated any violation of the "Cardinals clause" would subject the employee to dismissal. The court's rationale as to why the religious exemption should apply in this case is summed up on page 954 where the court says, "We are persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices whether or not

every individual plays a direct role in the organization's religious activities."

The lower Court relied on *Killinger v. Samford Univ.*, 113 F3d 196. In *Killinger*, the plaintiff was a professor who taught both at Samford University and the Divinity School, established by Samford University, Beason School of Divinity. Professor Killinger disagreed with a dean of Beason School of Divinity on Theology, and eventually was only allowed to teach at Samford and not at Beason. The court concluded that in this instance, since Samford University and Beason Divinity School were Baptist colleges, they could determine that Professor Killinger, who was also a Baptist but did not agree with some of the tenets of the Baptist religion which were followed by the Dean of Beason School of Divinity could be fired based on these religious grounds. Part of the court's decision was based on the fact that all faculty must subscribe to the 1963 Baptist Statement of Faith and Message, which contains various "affirmations" and "commitments" to advance in Christianity. Both the faculty handbook and individual faculty contracts affirm this commitment. Both stated termination as a potential penalty for failing to abide by it. In the case at hand, there is no claim that the College of the Ozarks is a Baptist, Presbyterian or any other religious denominational school. In fact, the affidavit which was attached to defendant's original motion to dismiss and signed by President Davis, states, that, "No particular denomination of Christianity is preferred." In addition, the affidavit at page four paragraph six 6(v) Dr. Davis indicates, "The worship services on campus are not used for the

promotion or propagation of any specific denominational doctrine, but for the promotion of Christian teachings."

This is a far cry from the situation that existed in Killinger, Little, or in *EEOC v. Mississippi College*, 626 F2d 477 (5th Cir. 1980). In the EEOC case, the court determined that this college was a "Religious educational institution." relying in part on the fact that ninety-five percent (95%) of the faculty were Baptist and eighty-eight percent (88%) of the students were Baptists. It is difficult to see where a college that is admittedly non-denominational would fit in to the models of the cases that have previously been decided. None of those cases deal with such a situation as in the College of the Ozarks where there is a community which is not composed solely of individuals faithful to their doctrinal practices, but rather a group of non-denominational individuals encouraged to pursue their own Christian beliefs. Stretching Title VII's exemption to this group of people stretches it too far.

An historical look at Title VII can only lead to the conclusion that Congress' intention in passing Title VII was to make sure that members of religious denominational schools can discriminate against people who are not members of that denomination that wish to teach at that school, and teachers who are members of that denomination but fail to live by the tenants of that particular religious denomination. It should have no application to a school that while historically has a loose tie with the Presbyterian church, self-confesses to no particular denomination of Christianity being preferred. *Larsen v. Kirkham,* 499 F. Sup. 960, 104 Sup. Ct. 157 (1983), sums up

the intentions of Congress when the exemption was passed, "The sponsors of the 1972 exemption were chiefly concerned to preserve the statutory power of sectarian schools and colleges to discriminate on religious grounds in the hiring of all their employees." Certainly this would seem to imply the exemption applies to schools which are set up for particular denominations or sects.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Eight Circuit

No. 99-2115WMS
98-3141-CV-S-4

James Wirth,

Appellant,

v.

College of the Ozarks, a Missouri Corporation; James P. Keeter; Robert Plaster; Harry L. Basore; John Q. Hammons; Williams B. Todd; Jack W. Justus; Joe Basore; Stan Kronke; Albert J. O'Brien; Robert Anderson; Arthur Cahill; Alice Edwards; Donald Wray; Gary Cowherd; Larry Walther; Steven Plaster; Mary McCleary-Posner; Jerry Davis; Kenton C. Olson; Suzanne Martin; Larry Cockrum; Teresa Geisler; Paul Gianoli; Jerry Esdon; Doug Switzer; Terry Hunt; Dana McMahan,

Appellees.

Appeal from the United States District Court for the Western District of Missouri

(Filed April 13, 2000)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.
(5172-010199)

March 9, 2000

(Mandate Issued Apr 11 2000)

A true copy

Attest: \s\ Clerk, U.S. Court of Appeals,
Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JAMES WIRTH,

Plaintiff,

v. Case No. 98-3141-CV-8-4

COLLEGE OF THE OZARKS, et al.,

(Filed August 28, 1998)

Defendants.

ORDER

Defendants have moved the Court, pursuant to Rule 12(b) (6), Federal Rules of Civil Procedure, to dismiss several counts of Plaintiff's Amended Complaint. For the reasons discussed below, Counts II, IV, 4, VI and VII of Plaintiff's Amended Complaint are dismissed.

I. 12(b) (6) Standard.

The purpose of a Rule 12(b) (6) motion is to resolve neither the merits of the claim nor the factual disputes therein; rather, it is to "test the formal sufficiency of the statement of the claim for relief." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (1990). In making this determination, the pleadings are construed in the light most favorable to the non-moving party and its allegations

are taken as true. *Id.* § 1357. However, if after such an examination the non-moving party's claim is determined to be formally insufficient, "the court has no discretion as to whether to dismiss [the] complaint." *Id.*

II. Discussion.

First, Defendants assert that Count II of Plaintiff's Amended Complaint should be dismissed to the extent it is based upon a claim of retaliation. In Count II, Plaintiff asserts that the College of the Ozarks retaliated and otherwise discriminated against him by terminating his employment on the basis of age and religion pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. To state a claim for retaliation under Title VII, Plaintiff must allege that (1) he engaged in activity protected under Title VII; (2) Defendants subsequently took adverse employment action against him; and (3) a causal relationship existed between the protected activity and the adverse employment action. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997).

In the case at bar, Plaintiff alleges that in 1989 he conducted a faculty survey which "measure[d] career goals or preferences, time expenditures, criteria for faculty evaluation, job satisfaction, and evaluation of institutional climate of decision-making." Subsequently, Defendant Kenton Olsen, Dean of the College of the Ozarks, questioned Plaintiff regarding the survey and ordered that the survey be terminated. According to Plaintiff, from 1990 through 1997, he received

either no pay raise or less than average pay raises. Additionally, Plaintiff's employment was terminated on April 24, 1997. Plaintiff also alleges that he is Catholic and was fifty-four years old when his employment was terminated. Defendants assert that Count II should be dismissed because Plaintiff has not alleged that he was engaged in activity which Title VII protects. The Court agrees.

Title VII prohibits employers from retaliating against employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). In the case at bar, Plaintiff alleges in Count II that he was retaliated against for conducting a survey to which his employer objected. Nowhere within County II does Plaintiff claim he took action of the type described in § 2000e-3(a) which is protected by Title VII. Therefore, Plaintiff has failed to allege that he was engaged in protected activity and Count II of the Amended Complaint must be dismissed to the extent it is based upon a claim of retaliation.

Second, Defendants assert that Count IV of Plaintiff's Amended Complaint should be dismissed. In Count IV, Plaintiff asserts that the College of the Ozarks discriminated against him in his employment because he is Catholic in violation of Title VII and the Missouri Human Rights Act ("MHRA"), Mo.Rev.Stat. § 213.010 et seq. Defendants claim that the College of the Ozarks is exempt from actions for religion discrimination under Title VII and the MHRA because

of its status as a religious affiliated organization. The Court agrees.

Title 42 U.S.C. § 2000e-1(a) provides that Title VII "shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Additionally, Title VII provides that

> it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. § 2000e-2(e). Similarly, the MHRA provides that "corporations and associations owned and operated by religious or sectarian groups" are not subject to the employment discrimination provisions set forth in Mo.Rev.Stat. § 213.055. The record establishes that the College of the Ozarks falls

squarely within the exemptions set forth by Title VII and the MHRA.[1]

The Presbyterian Church Synod founded the College of the Ozarks in 1906. In 1986, the college was incorporated in the state of Missouri as a not-for-profit corporation. The charter mission of the college is "providing Christian education for youth of both sexes, especially those found worthy but who are without sufficient means to procure such training." Additionally, the college is a member of the Coalition for Christian Colleges and Universities, a national organization of evangelical Christian Institutions, and a member of the Association of Presbyterian Colleges and Universities.

While Plaintiff does not deny that the College of the Ozarks is a Christian-based college, in opposition to Defendants' motion to dismiss Count IV, Plaintiff points to the affidavit of Dr. Jerry C. Davis, President of the College of the Ozarks, in which he states that "[n]o particular denomination of Christianity is preferred or encouraged by the college but a strong belief in Christianity is practiced." According to Plaintiff, because the College of the Ozarks is a non-denominational Christian organization it cannot be exempt from his claims that his employment was unlawfully terminated on

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[1]Although this case is now before the Court upon a motion to dismiss, the parties refer to matters outside the pleadings in support of and in opposition to Defendants' motion to dismiss Count IV of the Amended Complaint. Therefore, for purposes of Count IV only, the Court will consider matters outside the pleadings to determine if Plaintiff can maintain a claim for religious-based discrimination against the College of the Ozarks.

the basis he is Catholic because his views are also Christian. Plaintiff's argument is without merit.

The exemption under Title VII and the MHRA apply, by their terms, to "religious corporations" notwithstanding the particular beliefs which the religious corporations seek to foster. *See* 42 U.S.C. § 2000e-1(a); Mo.Rev.Stat. § 213.010(6). The College of the Ozarks clearly meets the definition of a religious corporation and therefore is not subject to Title VII and MHRA claims based upon religion. Additionally, even if the Court disregarded the plain language of 42 U.S.C. § 2000e-1(a) and Mo.Rev.Stat. § 213.010(6), it is clear that the purpose of the exemptions encompasses the case at bar.

Even though a Christian corporation or organization is non-denominational, it nevertheless may subscribe to particular religious views with which other Christians do not agree, and conversely, it may disagree with the religious views of other Christians. Indeed, if the Court accepts Plaintiff's allegations as true, which it must on a motion to dismiss, the college of the Ozarks terminated Plaintiff's employment and otherwise discriminated against him because he is a member of, and subscribes to the views of the Catholic Church. If true, it necessarily follows that the college took such action because it did not subscribe to the religious views which Plaintiff espoused. This is precisely the situation for which the exemptions were enacted; the exemptions allow religious institutions to employ only persons whose beliefs are consistent with the views of the religious organization. *See Killinger v. Samford University*, 113 F.3d 196, 200 (11th Cir. 1997).

Therefore, the College of the Ozarks is exempt from Plaintiff's Title VII and MHRA claims for religious discrimination. Count IV must be dismissed.

Third, Defendants claim that Plaintiff has failed to state a claim for relief under Count V of the Amended Complaint. Count V alleges that Kenton Olson and the College of the Ozarks violated Plaintiff's constitutional rights in violation of 42 U.S.C. § 1985. To state claim under § 1985, a plaintiff must plead (1) the existence of a conspiracy; (2) a purpose of depriving a person or class of persons of equal protection of the laws; (3) an act in furtherance of the alleged conspiracy; and (4) an injury to person or property or deprivation of a right or privilege granted to a U.S. Citizen. *See Majeske v. Fraternal Order of Police*, 94 F.3d 307, 311 (7th Cir. 1996). Additionally, a plaintiff must show "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators action.'" *Id. (quoting Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993)). Plaintiff has failed to state a claim under Count V because he has not pled any prohibited animus, only a dispute with Olson and the college over Plaintiff's election campaign for the Hollister School Board. Furthermore, to the extent Plaintiff bases Count V upon an allegation of religious discrimination, the claim fails as a matter of law because § 1985 cannot be invoked to protect rights created under Title VII. *See Foster v. Wyrick*, 823 F.2d 218 (8th Cir. 1987).

Finally, Defendants claim that Plaintiff has failed to state a claim for negligence under Missouri law in Counts VI

and VII of the Amended Complaint. Plaintiff alleges that the Board of Trustees of the college negligently failed to investigate his concerns during his removal from tenure. Additionally, Plaintiff contends that the "Faculty Welfare Committee" made up of several of the individual defendants, committed negligence by failing to stop the alleged breach of his employment contract by the College of the Ozarks. Counts VI and VII must be dismissed.

Plaintiff has not cited any authority, nor is the Court aware of any after extensive research, which suggests that a duy existed between Plaintiff and the members of the Faculty Welfare Committee or the Board of Trustees under Missouri law. Missouri courts have not recognized a tort of "negligent investigation" or "negligent discharge" upon which Plaintiff bases Counts Vi and VII. On the contrary, "the courts of this state have never recognized a mere breach of contract as providing a basis for tort liability." *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 230 (Mo. App. 1995). The Court concludes that under Missouri law, Plaintiff cannot assert a claim for negligence arising out of his termination. Therefore, Counts VI and VII of the Amended Complaint must be dismissed.

III. Conclusion.

For the foregoing reasons, it is hereby

ORDERED that Defendants' Motion to Dismiss Counts II, IV, V, VI and VII of the Amended Complaint (Doc. #19) is GRANTED.

Dated: August 28, 1998.

\s\ Gary A. Fenner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JAMES WIRTH,

Plaintiff,

v. Case No. 98-3141-CV-8-4

COLLEGE OF THE OZARKS,
et al.,

Defendants.

ORDER

Now pending before the Court is Defendant College of the Ozarks Motion for Summary Judgment (Doc. #44) on all claims in Plaintiff James Wirth's amended Complaint. For the reasons set forth below, Defendant's Motion for Summary Judgment is GRANTED.

I. BACKGROUND

Defendant College of the Ozarks (the "College") is a private educational institution governed by a Board of Trustees. In September of 1991, Plaintiff James Wirth began his employement with the College as an Assistant Professor of Sociology. Wirth was granted tenure on February 1, 1984. In late October of 1996, Dr. Kenton Olson, the Dean of the College, began an investigation into student complaints about the content of Wirth's Human Sexuality class. As a initial

result of the investigation, Wirth was suspended from his position at the College on November 13, 1996. Thereafter, the College began dismissal procedures to terminate Wirth's contract of employment with the College.

Wirth's employment contract with the College consisted of a letter of appointment which specified such items as salary and duration of the appointment and a Faculty Handbook which provided inter alia, procedures for dismissing a tenured professor for cause. The Faculty Handbook in place at the time of the events in question became effective on June 1, 1996. The Handbook provides that the Dean of the College must give notice to the faculty member that the Dean is recommending to the President that the faculty member be dismissed for cause. In addition, the faculty member must be provided the opportunity to meet with the Dean and present a defense to the dismissal recommendation before it is made. The Handbook also requires that the faculty member be provided the opportunity to meet with the President of the College to present a defense. Finally, the Handbook provides that the President's decision to affirm the Dean's dismissal recommendation could be appealed to the Faculty Welfare Committee. In such an event, the Faculty Welfare Committee reviews the case and makes a recommendation to the President.

In the present case, it is undisputed that the above-mentioned procedures were followed. Wirth was provided the opportunity to meed with both Dean Olson and the President of the College, Dr. Jerry Davis. Wirth also appealed to the Faculty Welfare Committe and a hearing was held befor the Committe.

The Committee voted unanimously to uphold Dr. Davis' decision to dismiss Wirth for cause. Wirth's employment was officially terminated on April 24, 1997, when the Board of Trustees of the College affirmed the recommendation to dismiss Wirth from his employment.

After his termination, Wirth brought this action in the Circuit Court of Taney County, Missouri. The action was removed to this Court on march 27, 1998, and Defendants thereafter filed a motion to dismiss for failure to state a claim upon which relief can be granted. The Court granted the motion as to five of the seven claims asserted by Wirth in his Amended Complaint. The two remaining claims assert causes of action for breach of contract and age discrimination in violation of the Age Discrimination in Employment Act (ADEA), see 29 U.S.C. § 621-634, and the Missouri Human Rights Act, see Mo.Ann.Stat. §§ 213.010-213.137. Defendants now move for summary judgment on these two remaining claims.

II. SUMMARY JUDGMENT STANDANRD

Summary judgment is appropriate if there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(e). The moving party has the initial burden of establishing, by way of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the

moving party makes its initial showing, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 s. Ct. 2505, 91 L.Ed.2d 202 (1986). In doing so, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.s. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In ruling on a motion for summary judgment, the court's function is not to weigh the evidence or make credibility determinations, but to "determine whether a dispute about a material fact is genuine." *Quick v. Donaldson Co. Inc.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996) (*citing Anderson*, 477 U.S. at 248-49). A genuine dispute about a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* 477 U.S. at 248. The court must view the facts in the light most favorable to the nonmoving party and allow that party the benefit of all reasonable inferences to be drawn from the evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

III. DISCUSSION

A. Breach of Contract

In support of his breach of contract claim, Wirth first contends that when the College adopted its 1991 Handbook, which was in effect until 1996, the adoptions constituted a

breach of contract because the changes in the Handbooks were not recommended by the faculty. Wirth bases this argument on language contained in the College's 1984 Handbook which was the governing Handbook until the adoption of the 1991 Handbook. The preface to the 1984 Handbook states that new policies in the Handbook will not be implemented until "after changes in the Handbook have been recommended by the faculty and approved by the president of the college or the Board of Trustees, after sample study."

Contrary to Wirth's contention, the record in this case shows that the faculty did indeed make recommendations on the content of the 1991 Handbook. A Faculty Handbook Committee was formed and Wirth himself was invited to the Committee meetings and gave reports to the Committee. In addition, the faculty of the College, at a meeting held on September 19, 1991, voted on recommendations to the 1991 Handbook. While some of the faculty recommendations may not have been adopted by the Board of Trustees, Wirth has failed to present any law or contractual language which would require the Board of Trustees to adopt the faculty recommendations in full. Moreover, the Court notes that the College was governed by the Board of Trustees and Wirth's retained expert witness on faculty handbooks testified in his deposition that the Board of Trustees has the ultimate authority on the content of the Faculty Handbooks. In sum, all that the language in the preface to the 1984 Handbook requires is that the faculty recommend changes before a new Handbook is adopted. Because the faculty did make recommendations in the

present case, this contractual requirement was satisfied and no breach of contract occurred. Wirth's first argument is thus without merit.

Even if the Court did not reach the conclusion set forth above, Wirth's breach of contract claim on this ground cannot be sustained because it is barred by the applicable statute of limitations. Missouri has two statute of limitations that govern contract actions. A ten-year statute of limitations applies for "[a]n action upon any writing, whether sealed or unsealed, for the payment of money or property." Mo.Ann.Stat. § 516.110. A five year statute of limitations applies for all other actions upon contracts, obligations or liabilities, whether express or implied. Mo.Ann.Stat. § 516.120. "The Missouri courts distinguish between an action to enforce a provision of the contract and an action for breach of contract: applying the ten-year statute of limitations to the former, and the five-year statute of limitations to the latter." *Aerotronics, Inc. v. Pneumo Abex Corp.* 62 F.3d 1053, 1068 (8th Cir. 1995). Wirth's claim is clearly for a breach of contract which he alleges resulted in money damages rather than for the enforcement of a contract term for the payment of money. Thus, the five year statute of limitations applies to his claim.

In addition, any damage resulting from the breach Wirth alleges was sustained and capable of ascertainmen ton October 22, 1991, when the 1991 Handbook replaced the 1984 Handbook. Under Mo.Ann.Stat. § 516.100, which applies to § 516.120, "the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or

duty occurs but when the damage resulting therefrom is sustained and is capable of ascertainment." Wirth was aware that a new Handbook took effect in October of 1991. Regardless of whether Wirth could prove any actual damages resulting from the alleged breach, proof of a contract and its breach gives rise to nominal damages in contract cases. *Wasson v. Schubert*, 964 S.W.2d 520, 526 (Mo.Ct.App. 1998). Thus, the damage resulting from the breach asserted by Wirth was sustained, if at all, on October 22, 1991, and was clearly capable of ascertainment on that date as well. Thus, Wirth's first argument fails on this ground as well.[1]

Wirth also argues that, because his letter of appointment stated that "[m]utual consent is required should you leave the employment of the college at any time during the term of this

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[1]The Court notes that Wirth also alleges that a breach of contract occurred when the College adopted its 1996 Handbook. This claim, while obviously not barred by the five year statue of limitations, is otherwise without merit. Wirth claims that the College's adoption of the 1996 Handbook resulted in the same breach that allegedly occurred when the College adopted the f1991 Handbook. Specifically, Wirth claims the College failed to follow the requirement that changes to the Handbook be recommended by the faculty. However, contrary to Wirth's contention, the 1991 Handbook, not the 1984 Handbook, governed the procedures for adoption of the 1996 Handbook. The 1991 Handbook is more determinative than the 1984 Handbook as to the Board of Trustees possessing the ultimate authority on the content of the Faculty Handbooks. The preface to the 1991 handbook states that "[a] procedure is provided whereby faculty or others may recommend changes to the Board. However, the Board of Trustees reserves the right to make changes deemed proper and necessary." Thus, the lack of faculty recommendation on the content of the 1996 Handbook cannot support a breach of contract claim.

contract," the College breached its contract of employment with him because he never consented to his termination.[2] The Court finds this argument meritless. In the first place, the language contained in the letter of appointment obviously applies to a situation wherein a faculty member indicates his or her departure from the College and seeks agreement to the departure from the College. Secondly, the 1996 handbook contains procedures for dismissing a tenured professor for cause. While the 1996 Handbook contains procedures for dismissing a tenured professor for cause. While the 1996 Handbook proves that the provisions of a letter of appointment shall supercede the general policies in the Handbook when the two are inconsistent, Wirth's argument would void and eliminate all portions of the Handbook allowing removal of a tenured professor for cause. In essence, accepting Wirth's argument would require the Court to hold that only tenured professors who agree that they should be discharged can be discharged. The Court cannot endorse such a holding. Under

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[2]Defendants move to strike Wirth's exhibit 11 to his Suggestions in Opposition to Defendant's Motion for Summary Judgment. Exhibit 11 purports to be Wirth's letter of appointment for the 1995-1996 academic year containing the "mutual consent" language. Defendant's base their motion to strike on the grounds that the letter is not authenticated and is irrelevant because Wirth's 1996-1997 letter of appointment governed his employment at the time of his discharge. The Court agrees and will strike Wirth's Exhibit 11 from the record. *See O'Bannon v. Union Pac. R.R. Co.*, 960 F.Supp. 1411, 1418 (W.D. Mo. 1997). However, for purposes of considering Wirth's mutual consent argument, the Court will assume that his 1996-1997 letter of appointment contained the mutual consent language. Even in light of this assumption by the Court, Wirth's argument on this point fails.

Missouri law, various sections of a contract alleged to be in conflict should be harmonized if at all possible. *See e.g. city of Columbia v. Paul N. Howard and Co.*, 707 F.2d 338 (8th Cir. 1983), *cert. denied*, 464 U.S. 893, 104 S.Ct. 238, 78 L.Ed.2d 229 91983) (applying Missouri law); *Triad Capital Partners, Inc. v. Kinetic Env. Lab. Inc.*, 808 F.Supp. 690 (E.D. Mo. 1992). The Court finds that the mutual consent requirement in the letter of appointment is easily harmonized with the for cause dismissal procedures contained in the Handbook in that the former apply only when a faculty member decides to voluntarily leave the College and the latter do not. Thus, the College did not need Wirth's consent to terminate him for cause and the College complied with Wirth's contractual employment rights by following the dismissal for cause procedures et forth in the 1996 Faculty Handbook.

Finally, Wirth argues that under the 1996 Handbook, his removal from employment was required to have been recommended by the Evaluation Committee and accepted by the president of the College. This argument is based on an erroneous reading of the Handbook language itself. The language in the Handbook upon which Wirth relies on is found in section H.1 and provides that "[f]aculty members who have attained tenure status under previous handbooks will continue to hold said status and will under continuous letter of appointment *as per section C.2.b.* unless removal is recommended by the Evaluation Committee (Sect. F.5.j.4b) and accepted by the president (F.5.1.4b)" (emphasis added). Section C.2.b. states that "[f]aculty members employed under

continuous letters of employment are entitled to annual renewal unless tenure is removed pursuant to provisions of section F and shall be subject to the terms and conditions of employment that exist at the time of each annual renewal unless separated pursuant to the provisions of section I." Section I, in turn, deals with separation from employment and contains the procedures governing a dismissal for cause which applied to Wirth's discharge.

Thus, under the plain language of the Handbook, faculty members are under continuous letter of appointment unless (1) tenure is removed pursuant to the provisions of Section F dealing with the evaluation of faculty members (section C.2.b.) Or (2) unless separated from employment pursuant to provisions of section I dealing with dismissal for cause (section C.2.b.); or (3) if neither of the above apply, if removal is recommended by the Evaluation Committee and accepted by the president (section H.1.). In other words, a removal which requires the recommendation of the Evaluation Committee is applicable only if a tenured professor under a continuous letter of appointment has not already had that status dealt with under sections F or I. Thus, a correct reading of the Handbook reveals that a tenured professor can be discharged under the section I dismissal for cause procedures without a recommendation for removal by the Evaluation Committee. Because the College followed the Handbook procedures for discharged Wirth and because Wirth has otherwise utterly failed to demonstrate that the College breached its contract of employment with him,

Defendants are entitled to summary judgment on Wirth's breach of contract claim.

B. ADEA and MHRA

Wirth, admitting that he has been unable to produce any evidence supporting his ADEA and MHRA claims, moves to voluntarily dismiss these claims without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. However, the Court finds that such a dismissal is not warranted.

Rule 41(a)(2) is primarily designed to prevent a voluntary dismiss that would result in unfairness to the other side. *Paulucci v. City of Duluth*, 826 F.2d 780, 782 (8th Cir. 1987). While the decision to grant a voluntary dismissal under Rule 41(a)(2) is within the sound discretion of the district court, *Witzman v. Gross*, 148 F.3d 988, 991-92 (8th cir. 1998) (*citing Kern v. TXO Pro. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)), a dismissal will generally by granted when the defendant will suffer only that prejudice which results from a subsequent lawsuit. *Paulucci*, 826 F.2d at 782. The Eighth Circuit has set forth the following factors to be considered when ruling upon a Rule 41(a)(2) motion:

> (1) the defendant's effort and the expense involved in preparing for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) insufficient explanation of the need to take a dismissal; and (4) the fact that a motion for

> summary judgment has been filed by the defendant.

Witzman, 148 F.3d at 992.

Applying these factors to the case at bar makes it clear that Wirth's motion for voluntary dismissal should be denied. Defendants have already engaged in and completed discovery. Defendants have gone to the time and expense of opposing Wirth's motion to remand and briefing a motion to dismiss, which was granted by the Court. Defendants have also prepared a motion for summary judgment on the ADEA and MHRA claims. And it is important to remember that all this was done at considerable expense to the defendants. Additionally, Wirth has not given a sufficient explanation of the need for a voluntary dismissal. In fact, Wirth provides no explanation other than the fact that he has been unable to procure any evidence supporting his claims.

It has already been noted that Defendants have filed a motion for summary judgment on these claims. And "a party should not be permitted to avoid an adverse decision on a dispositive motion by dismissing a claim without prejudice" *Phillips U.S.A., Inc. v. Allflex U.S.A., Inc.* 77 F.3d 354, 358 (10th Cir. 1996). Wirth should not be allowed to voluntarily dismiss this case and deprive Defendants of a ruling on their currently pending motion for summary judgment, especially when such a ruling may lead to dismissal of all claims. *Millsap v. Jane Lamb Memorial Hospital,* 111 F.R.D. 481, 484 (S.D. Iowa 1986).

In sum, the Court's consideration of the relevant factors leads to the conclusion that granting plaintiff's motion for voluntary dismissal would be inappropriate. This is a case where Defendants would suffer far more prejudice than that resulting from just a subsequent lawsuit, *See Paulucci*, 826 F.2d at 782, because they would be deprived of the chance to have these claims against them settled by their pending motion for summary judgment. Wirth's request to voluntarily dismiss his ADEA and MHRA claims without prejudice is denied. Thus, the Court will consider Defendant's motion for summary judgment on these claims.

To establish a claim under the ADEA[3], a plaintiff must show that he or she was intentionally discriminated against by the defendant, based on age. *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998). Wirth claims he was discriminated against on the basis of age in two ways: (1) his termination from employment and (2) by less than average pay raises for several years prior to his termination.

As to Wirth's pay raise claim, the Court finds that any relief for his claim is barred by the 300-day statute of limitations in the ADEA. *See* 29 U.S.C. § 626(d)(2); *see also* 29 U.S.C. § 633(b). Wirth's last raise was issued on may 8, 1996, and he filed his charge of discrimination with the Equal Employment Opportunity Commission on June 25, 1997.

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[3] The Court's analysis under the ADEA applies equally to Wirth's claims under the MHRA. *Breeding v. Gallagher andCo.*, 164 F.3d 1151, 1156 (8th Cir. 1999).

Because the less than average pay increases are discrete employment actions that occurred more than 300 days before Wirth filed his charge, any claim based on them is barred. *See Stolzenburg v. Ford Motor Co.*, 143 F.3d 402, 405 (8th Cir. 1998); *see also Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996) (finding a denied raise a discrete employment action).

To the extent Wirth's claim under the ADEA is based on his termination, the Court finds that Wirth has failed to establish a prima facie case of age discrimination. Wirth's ADEA claim is governed by the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998). Under this framework, the plaintiff must first establish a prima facie case of age discrimination. *Id.* To establish a prima facie case in the present situation, Wirth must prove that (1) he is a member of a protected age group; (2) he was qualified for the position he held; (3) despite his qualifications, he was discharged; and (4) he was replaced by a younger person. *Id; see also Ziegler v. Beverly Enterprises-Minnesota, Inc.*, 133 F.3d 671, 675 (8th Cir. 1998). The undisputed evidence in the case at bar shows that Wirth, fifty four years old at the time of his discharge, was replaced by Dr. Carl Young who was 60 years old at the time he was hired to replace Wirth. Thus, Wirth has failed to generate a factual dispute on an essential element of his prima facie case. Accordingly, the Court finds that Defendants are entitled to summary judgment on Wirth's ADEA and MHRA claims.

IV. ORDER

For the foregoing reasons, it is hereby ORDERED that:

(1) Defendant College of the Ozarks Motion for Summary Judgment (Doc. #44) is GRANTED.

IT IS SO ORDERED.

Dated: 3-23-99

\s\ GARY A. FENNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JAMES WIRTH,

Plaintiff,

v. Case No. 98-3141-CV-8-4

COLLEGE OF THE OZARKS,

(Filed May 18, 1999)

Defendant.

ORDER AWARDING ATTORNEY'S FEES AND COSTS

Plaintiff initially filed a seven count petition in state court. Defendant removed it to this Court. Defendant filed a motion to dismiss the original petition. Plaintiff then filed his amended complaint. Defendant moved to dismiss all of plaintiff's claims. This Court granted most of defendant's motion when it dismissed five of the seven counts in its order dated August 28, 1998. The remaining counts, alleging age discrimination and breach of contract, were disposed of by the Court by summary judgment entered on March 23, 1999.

Under Title VII, a successful defendant is entitled is entitled to have its attorney's fees paid by the plaintiff if the court "finds that his claim was frivolous, unreasonable, or

groundless, or that the plaintiff continued to litigate after ti clearly became so." *Marquart v. Lodge 837 Intern. Ass'n of Machinists and Aerospace Workers*, 26 f.3d 842, 847 (8th Cir. 1994) (citing *Christinsburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)). The prevailing defendant can be awarded fees *even if the plaintiff did not bring the claims in "subjective bad faith." Christinsburg*, 434 U.S. at 422 (emphasis added). This standard is also true for plaintiff's claims under the Missouri Human Rights Act. See R.S.Mo. § 213.111(2).

Plaintiff alleged two forms of Title VII discrimination in his original petition and amended complaint: retaliation and religious discrimination. Both claims were groundless and objectively unreasonable.

RETALIATION

The claim of retaliation failed to allege facts that could possibly be considered protected activity under Title VII. As this Court noted in its order sustaining the motion to dismiss, an alleged dispute over a faculty survey in 1989 cannot, under even the broadest reading of Title VII, state a valid claim of Title VII retaliation. This argument was unsupported by any legal authority or the plain language of Title VII. Claims that do not have any basis under the law can support an award of attorney's fees to a defendant. *See Hoover v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 199); *Bond v. Keck*, 629 F.Supp. 225, 227 (E.D.Mo. 1986), *aff'd* 802 F.2d 463 (8th Cir. 1986) (noting lack of any evidence to support plaintiff's claim supports awarding

attorney's fees to defendant). Plaintiff has not reasonable explanation how a faculty survey taken in 1989 that allegedly made defendant angry at plaintiff can be alleged to be protected activity under Title VII.

Defendant is entitled to total attorney's fees for research and response to the unsupported Title VII retaliation claim of $410.00

RELIGIOUS DISCRIMINATION

The claim of religious discrimination under Title VII and the Missouri Human Rights Act was also groundless and objectively unreasonable. Plaintiff was aware of the pervasive religious character of College of the Ozarks from his eighteen plus years of working for defendant. Plaintiff had no factual basis to allege that College of the Ozarks was a secular or non-religious [pages 3 and 4 of the original order were not forwarded to Appellant's counsel].

Buford v. Tremayne, 747 F.2d 445, 448 (8th Cir. 1984) (awarding defendant's attorney's fees after successfully obtaining summary judgment).

Defendant is entitled to recover total attorney's fees because of plaintiff's bad faith in bringing his age discrimination claim in the amount of $9,371.00

COSTS

Plaintiff is further ordered to pay all taxable costs already incurred by him and costs for depositions and the filing fee for removal of this case from state to federal court as follows:

Deposition of James Wirth	$ 768.80
Deposition of Shirley Wirth	$ 138.25
Deposition of T. Emmet	$ 483.25
Deposition of Dr. Davis	$ 21.60
Deposition of K. Olson	$ 106.20
Total Deposition Costs:	$1,518.10
Petition for Removal Filing Fee:	$ 150.00
Total Costs:	$1,668.10

WHEREFORE, defendant is awarded is awarded judgment against plaintiff for attorney's fees and costs as addressed herein in the total amount of $15,134.10.

\s\ GARY A. FENNER, JUDGE
United States District Court

DATED: 5-18-99

APPENDIX

A. Judgment of the United States Court of Appeals for the Eighth Circuit

B. Order of the United States District Court for the Western District of Missouri Southern Division

C. Order of the United States District Court for the Western District of Missouri Southern Division

D. Order of the United States District Court for the Western District of Missouri Southern Division

Supreme Court, U.S.
FILED
00-830 JUN 7 - 2000

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES WIRTH
Petitioner,

vs.

COLLEGE OF THE OZARKS, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

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ATTORNEY FOR PETITIONER

UNITED STATES COURT OF APPEALS
For the Eight Circuit

98-3141-CV-S-4

James Wirth,

Appellant,

v.

College of the Ozarks, a Missouri Corporation; James P. Keeter; Robert Plaster; Harry L. Basore; John Q. Hammons; Williams B. Todd; Jack W. Justus; Joe Basore; Stan Kronke; Albert J. O'Brien; Robert Anderson; Arthur Cahill; Alice Edwards; Donald Wray; Gary Cowherd; Larry Walther; Steven Plaster; Mary McCleary-Posner; Jerry Davis; Kenton C. Olson; Suzanne Martin; Larry Cockrum; Teresa Geisler; Paul Gianoli; Jerry Esdon; Doug Switzer; Terry Hunt; Dana McMahan,

Appellees.

Appeal from the United States District Court for the Western District of Missouri

[UNPUBLISHED]

Submitted: March 3, 2000
Filed: March 9, 2000

Before RICHARD S. ARNOLD, FAGG, and HANSEN, Circuit Judges.

PER CURIAM.

After his 1997 termination from a tenured professorship at the College of the Ozarks, James Wirth brought this action against the College and many individuals alleging several claims, including breach of contract and religious discrimination. The district court granted summary judgment to the defendants on the contract and discrimination claims, dismissed the remaining claims, and awarded the defendants attorney's fees and costs. Wirth appeals these rulings. Having carefully reviewed Wirth's arguments, the record, the law, and the district court's analysis, we conclude the district court properly rejected Wirth's claims and properly awarded the defendants fees and costs. We have nothing to add to the district court's thorough opinions, and thus affirm without further comment. See 8th Cir. R. 47B.

A true copy

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX

A. Opinion of the United States Court of Appeals for the Eighth Circuit